

Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd (Poly Glass Fibre (M) Bhd, applicant)

HIGH COURT (SHAH ALAM) — COMPANIES WINDING UP NO MT4–28–1 OF 1999
ZULKEFLI J
4 SEPTEMBER 2002

Companies and Corporations — *Winding up* — *Stay of proceeding* — *Considerations to be taken into account* — *Whether application for stay must be served on all creditors of company* — *Meaning of creditor* — *Application for stay by contributory* — *Meaning of contributory* — *Companies Act 1965 ss 4(1), 243, Companies (Winding Up) Rules 1972 r 64(1)*

Words and Phrases — *Winding up* — *Creditor*

Words and Phrases — *Winding up* — *Contributory* — *Companies Act 1965 ss 4(1) and 243*

The respondent was at all material times a licensed developer of a housing project situated at Lot Nos 9887 and 9888, Mukim of Ulu Bernam, Daerah Tanjung Malim, Perak ('the project'). The petitioner was appointed by the respondent to be the main contractor for certain works under the project. The petitioner alleged that the respondent was indebted to them the sum of RM2,108,820.22 being the sum due and owing for works under the project. The petitioner then presented a winding up petition against the respondent pursuant to s 218(1) of the Companies Act 1965 ('the Act'). The court proceeded to grant the winding up order on 12 June 2000. As against the winding up order, the respondent had filed an appeal to the Court of Appeal. Pending disposal of the appeal, the respondent had filed an application for stay of the winding up order ('the stay application'). The court granted an interim stay. In this application, the applicant sought leave from the court to be made an applicant to this proceeding and for all proceedings in relation to the winding up of the respondent granted by the court on 12 June 2000 to be stayed pursuant to s 243 of the Act. The petitioner opposed to these applications.

Held:

- (1) Section 4(1) of the Act defines a 'contributory' to mean, inter alia, 'the holder of fully paid shares in the company'. As all the issued and paid up share capital of the respondent were held by the applicant, the applicant was a contributory in the respondent company for the purpose of s 243(1) read together with s 4(1) of the Act and was a proper party before the court. Hence, the application for leave by the applicant to be made an applicant to this proceeding was granted (see p 638A–B).
- (2) There is no such requirement provided under s 243 of the Act or the Companies (Winding Up) Rules 1972 ('the Rules') that an

- A application made under s 243 of the Act must be served on all the creditors of the wound up company. Rule 64(1) of the Rules provides that only creditors whose proof has been admitted are entitled to attend proceedings in relation to the winding up of a company by the court. In this regard, there was no evidence of proof pursuant to r 64(1) of the Rules adduced before the court.
- B The creditors were represented by the official receiver in any event whose representative had attended court and did not object to the application (see p 638C–F).
- (3) An application under s 243 of the Act can be made ‘at any time after an order for winding up has been made’. In view of the very short period this application was made after the winding up and the fact that liquidation has yet to commence, the court ought to be more ready to grant a stay (see p 642A, D); *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 followed.
- C
- D It is in the interest of the public at large that the stay should be allowed. The respondent was involved in a very large scale housing development and there was clear evidence to show that several units of houses and lands were sold to the public at large. If a stay is not allowed, the house and land purchasers of the project would be put in a dilemma and in a position of constant uncertainty (see pp 642H–643A); *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadachatiram & Ors* [1995] 2 MLJ 709 followed.
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- (5) A ‘creditor’ for the purpose of a liquidation must necessarily mean a creditor who has proved his debts or claims. A close look at the official receiver’s report showed that the petitioner has not even lodged his claims with the official receiver. There was further no evidence that the petitioner had been exempted by the court to prove his debts or claims against the respondent. Hence, the petitioner is not a ‘creditor’ for the purpose of this application. As such, the petitioner is not a proper party to oppose this application or a party whose interest the court should take into consideration.
- F
- G Even if the High Court is to find that the petitioner is a ‘creditor’ for the purpose of this proceeding, the interest of the public at large in the instant case overrides that of the petitioner’s interest, if any (see pp 643I–644B).

H [Bahasa Malaysia summary]

I Responden merupakan seorang pemaju berlesen sebuah projek perumahan yang terletak di Lot No 9887 dan 9888, Mukim Ulu Bernam, Daerah Tanjung Malim, Perak (‘projek tersebut’). Pempetisyen dilantik oleh responden sebagai kontraktor utama untuk kerja-kerja tertentu di bawah projek tersebut. Pempetisyen mengatakan bahawa responden berhutang dengan mereka jumlah sebanyak RM2,108,820.22 yang merupakan jumlah yang harus

dibayar dan yang terhutang untuk kerja-kerja di bawah projek tersebut. Pempetisyen kemudian mengemukakan petisyen penggulungan terhadap responden menurut s 218(1) Akta Syarikat 1965 ('Akta tersebut'). Mahkamah telah membenarkan perintah penggulungan pada 12 Jun 2000. Mengenai perintah penggulungan tersebut, responden telah memfailkan satu rayuan kepada Mahkamah Rayuan. Sementara penyelesaian rayuan, responden juga telah memfailkan satu permohonan supaya perintah penggulungan digantung. Mahkamah membenarkan penggantungan interim. Dalam permohonan ini, pemohon memohon kebenaran daripada mahkamah supaya dijadikan pemohon kepada prosiding ini dan untuk semua prosiding berhubung dengan penggulungan responden yang dibenarkan oleh mahkamah pada 12 Jun 2000 digantung menurut s 243 Akta tersebut. Pempetisyen membantah permohonan-permohonan tersebut.

Diputuskan:

- (1) Seksyen 4(1) Akta tersebut mentakrifkan 'contributory' untuk bermakna, antara lain, 'the holder of fully paid shares in the company'. Oleh kerana kesemua saham modal yang dikeluarkan dan dibayar responden dipegang oleh pemohon, pemohon merupakan 'contributory' dalam syarikat responden bagi tujuan s 243(1) dibaca bersama s 4(1) Akta tersebut dan adalah pihak yang betul di hadapan mahkamah. Justeru itu, permohonan untuk kebenaran oleh pemohon supaya dijadikan pemohon kepada prosiding ini dibenarkan (lihat ms 638A–B).
- (2) Tiada apa-apa peruntukan di bawah s 243 Akta tersebut atau Kaedah-Kaedah Syarikat (Penggulungan) 1972 ('Kaedah tersebut') yang menuntut bahawa satu permohonan yang dibuat di bawah s 243 Akta tersebut mestilah dikemukakan ke atas kesemua pemiutang syarikat yang digulung. Kaedah 64(1) Kaedah tersebut memperuntukkan bahawa hanya pemiutang yang mana beban telah dibuktikan berhak menghadiri prosiding berhubung dengan penggulungan sesebuah syarikat oleh mahkamah. Tiada keterangan atas beban menurut k 64(1) Kaedah tersebut yang dikemukakan kepada mahkamah. Walau bagaimanapun, pemiutang diwakili oleh pegawai penerima yang mana wakilnya telah menghadiri mahkamah dan tidak membantah terhadap permohonan tersebut (lihat ms 638C–E).
- (3) Satu permohonan di bawah s 243 Akta tersebut boleh dibuat 'at any time after an order for winding up has been made'. Memandangkan jangka masa pendek dalam mana permohonan ini dibuat selepas penggulungan dan hakikat bahawa penyelesaian masih belum bermula, mahkamah seharusnya lebih bersedia untuk membenarkan penggantungan (lihat ms 642A, D);

Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 diikuti.

- A** (4) Penggantungan harus dibenarkan bagi menjaga kepentingan awam. Responden terlibat dalam pembangunan perumahan pada skala yang amat besar dan ada keterangan yang jelas untuk menunjukkan bahawa beberapa unit rumah dan tanah telah dijual kepada masyarakat awam. Sekiranya penggantungan tidak dibenarkan, pembeli rumah dan tanah projek tersebut akan menghadapi masalah dan diletakkan dalam kedudukan yang sentiasa tidak menentu (lihat ms 642H–643A); *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadachatiram & Ors* [1995] 2 MLJ 709 diikuti.
- B**
- C** (5) Seorang ‘creditor’ untuk tujuan penyelesaian semestinya bermaksud seorang pemiutang yang telah membuktikan hutang atau tuntutan. Pemeriksaan yang lebih teliti ke atas laporan pegawai penerima menunjukkan bahawa pempetisyen masih belum mengemukakan tuntutan dengan pegawai penerima. Selanjutnya tiada keterangan bahawa pempetisyen telah dikecualikan oleh mahkamah untuk membuktikan hutang atau tuntutan terhadap responden. Justeru itu, pempetisyen bukanlah ‘creditor’ untuk tujuan permohonan ini. Oleh yang demikian, pempetisyen bukanlah pihak yang wajar untuk membantah permohonan ini atau suatu pihak yang mana kepentingannya harus dipertimbangkan oleh mahkamah. Jikapun mahkamah ini mendapati bahawa pempetisyen adalah seorang ‘creditor’ untuk tujuan prosiding ini, kepentingan masyarakat awam dalam kes ini mengatasi kepentingan pempetisyen, jika ada (lihat ms 643I–644B).]
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- E**

Notes

- F** For cases on stay of proceeding of winding up order, see 3 *Mallal’s Digest* (4th Ed, 2000 Reissue) paras 1123–1134.

Cases referred to

- G** *Calgary & Edmonton Land Co Ltd (In Liq), Re* [1975] 1 WLR 355 (refd)
Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 (folld)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadachatiram & Ors [1995] 2 MLJ 709 (folld)
- H**

Legislation referred to

- Companies Act 1965 ss 4(1), 169, 174(8), 218(1)(e), (2)(a), 243(1), (2)
- I** Companies (Winding Up) Rules 1972 r 64(1)
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Regulations 1989

KY Lim (Fiona Barnaby and Dato' Mahinder Singh with him) (KY Lim, Barnaby & Tan) for the petitioner. **A**

ET Low (Cheong Wai Meng & Van Buerle) for the respondent.

Enroll Joseph (Lee Hishamuddin) for the applicant.

Zulkefli J:

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Introduction

This is an application by way of a notice of motion in encl (20) filed by the applicant. In prayer (1), the applicant is seeking leave from this court to be made an applicant herein. Prayer (2) of the application seeks an order that all proceedings in relation to the winding up of the respondent granted by this court on 12 June 2000 ('the winding up order') be stayed pursuant to s 243 of the Companies Act 1965 ('the Act'). The application is opposed by the petitioner, and the parties have filed their respective affidavits. A report dated 28 November 2000 was furnished by the official receiver pursuant to s 243(2) of the Act ('OR's report').

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At the outset, it is essential to set out the relevant provisions of s 243 of the Act which provide that:

- (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.
- (2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

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It is plain that, in an application under s 243(1) of the Act, the court has a discretion to grant a stay altogether or for a limited time.

Relevant facts leading to the winding up

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The winding up order was made against the respondent on the petition of the petitioner presented under s 218(1) of the Act. For the purpose of this application, it is not necessary to canvass in detail the background of the winding up. Suffice it to say, the respondent was at all material times a licensed developer of a housing project known as 'Diamond Creeks Country Retreat' or 'Desa Istirehat Diamond Creeks' situated at Lot Nos 9887 and 9888, Mukim of Ulu Bernam, Daerah Tanjung Malim, the state of Perak ('the project'). By two letters of award dated 26 January 1995 and 26 July 1995 respectively, the respondent appointed the petitioner to be the main contractor for the project in two areas of works, namely:

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- (a) the main access road works ('the said main access road works'); and
- (b) the stage 1 civil infrastructure works ('the said stage 1 works').

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- A** The petitioner alleged that the respondent was indebted to them to the sum of RM2,108,820.22 being the sum due and owing under a final payment certificate and a progress payment certificate in respect of the said main access road works and the said stage 1 works. The petitioner subsequently issued a notice under s 218 of the Act dated 8 December 1998 ('the s 218 notice') to the respondent claiming for payment of RM2,108,820.22. By a letter dated 23 December 1998 to the petitioner's solicitors, the respondent replied through its solicitors, denying its indebtedness as alleged in the s 218 notice. The petitioner then presented a winding up petition against the respondent on 4 January 1999 pursuant to s 218(1)(e) read together with s 218(2)(a) of the Act. By a notice of motion dated 20 May 1999, the respondent moved the honourable court to strike out the winding up petition ('the striking out motion'). Both the winding up petition and the striking out motion were directed by the learned trial judge YA Chin Fook Yen to be heard together. After hearing submission of counsel, the learned trial judge had on 3 May 2000 dismissed the striking out motion and the learned trial judge proceeded to grant the said winding up order on 12 June 2000.

- D** As against the said winding up order, the respondent has filed an appeal to the Court of Appeal vide notice of appeal dated 13 June 2000. Pending disposal of the appeal, the respondent has also filed an application for stay of the winding up order which is in the court's encl (16) ('the stay application'). When this application and the stay application were first fixed for hearing on 6 November 2000, by consent between the petitioner and the respondent and subject to the undertakings given by the respondent, the court granted an interim stay of the winding up order pending finalization of this application ('the interim stay'). By further consent of the parties, the interim stay was further extended on 17 and 22 November 2000 until the finalization of this application. On all three occasions, the representatives of the official receiver were before the court, and no objections were made by the representatives of the official receiver with regard to the interim stay. Taking into consideration the interim stay, the liquidation had been proceeding only for a short while from 12 June 2000 to 6 November 2000. It is evident from the OR's report that, apart from the receipt of the statutory statement of affairs, no further liquidation action has been taken by the official receiver in view of the interim stay.

Leave application

- H** An application under s 243(1) of the Act can only be made by three categories of persons, namely: (i) the liquidator; (ii) the creditor; or (iii) the contributory. The respondent is a private company limited by shares incorporated on 24 June 1993 in Malaysia under the Act. As at the date of the said winding up order, the authorized share capital of the respondent was RM200m divided into 200m ordinary shares of RM1 each, of which RM100m ordinary shares were issued and fully paid. All the issued and paid up share capital of the respondent were and are currently held by the applicant. In effect, the respondent is a wholly owned subsidiary of the applicant. The applicant is a public listed company whose shares are listed

for quotation on the official list of the second board of the Kuala Lumpur Stock Exchange. Section 4(1) of the Act defines a 'contributory' to mean, inter alia, 'the holder of fully paid shares in the company'. As all the issued and paid up share capital of the respondent is held by the applicant, it is my view that the applicant is a contributory in the respondent company for the purpose of s 243(1) read together with s 4(1) of the Act and is a proper party before the court. Hence, prayer (1) of the application should be allowed and leave be granted to the applicant to be made an applicant herein.

Preliminary objection

It is also necessary to state here that the petitioner has raised a preliminary objection in respect of the applicant's application in encl (20). Learned counsel for the petitioner contended that the application in encl (20) ought to be served on all the respondent's creditors. On this preliminary objection, it is my view there is no such requirement provided under s 243 of the Act or the Companies (Winding Up) Rules 1972 ('the Rules') that an application made under s 243 of the Act must be served on all the creditors of the wound up company. It is observed that r 64(1) of the Rules provides that only creditors whose proof has been admitted are entitled to attend proceedings in relation to the winding up of a company by the court. In this regard that there is no evidence of request pursuant to the said r 64(1) of the Rules, has been adduced before this court. The applicant has deposed that its solicitors had attempted to obtain a list of creditors who had filed proof of debt but yet no such list has been supplied to the applicant. On this issue, I take the view that the creditors are represented by the official receiver in any event whose representative has attended court and did not object to the application. Counsel for the petitioner has relied on the Federal Court decision in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 to support his contention. In my view, what the Federal Court had stated in that case was that it had laid down certain principles, inter alia, that the court will not only consider the interests of the creditors but also other considerations. The Federal Court did not rule that an application under s 243 of the Act must be served on all the creditors. It is unworkable, assuming that a company has more than few hundred creditors, then the application must be served on the few hundred creditors and the court hearing all of them. In the case here, it is obvious that the official receiver is a proper party to represent the creditors. In the circumstances of this case, I therefore dismissed the petitioner's preliminary objection.

I shall now deal with the merits of the applicant's application in encl (20).

Grounds for the application

The applicant is a public listed company and held all the 100m paid up share capital of RM1 each in the respondent company. The respondent is a licensed developer of the project and a licence issued under the Housing Developers (Control and Licensing) Act 1966 and the Housing Developers

A (Control and Licensing) Regulations 1989 for the project in the name of the respondent is valid up to 11 March 2002. The project involves the development of about 1,700 acres of land comprising the following phases and types of development:

B	Phase	Types of development	Total units
	1	– Bungalow Land and Buildings	164
		– Bungalow Land	113
		– Orchard Land	120
C	2A	– Bungalow Land and Buildings	4
		– Bungalow Land	99
		– Orchard Land	102
D	2	– Bungalow Land	179
		– Orchard Land	94
	2D	– Orchard Land	41
E	3	– Orchard Land	103
	3A	– Orchard Land	62
	Total:		1,179

F The applicant has adduced evidence to the effect that when the project is fully completed and developed, it is forecasted that the project would generate a sale revenue of about RM412,734,259 for the respondent. As at 31 August 2000, 420 units of various lands and buildings were sold to the public. In so far as the development of the project is concerned, there is evidence to show that the respondent has ongoing contractual commitments and obligations towards the house and land purchasers, ie the public at large, in that:

For bungalow land and buildings

- H**
- (1) In respect of Phases 1 and 2A, 104 units were issued with certificates of fitness; 20 units are pending issuance of certificates of fitness and 34 units are at various stages of construction.
 - (2) Pursuant to the terms of the sale and purchase agreements entered into between the house purchasers and the respondent, the respondent's ongoing contractual commitments and obligations are, inter alia:
- I**
- (a) in respect of the completed units, the respondent is to comply with the defect liability requirements for 12 months from the

- date of handing over of vacant possession under cl 23 of the sale and purchase agreement; **A**
- (b) in respect of the completed units but pending issuance of the certificate of fitness, the respondent must obtain at its costs and expense, the final certificate of fitness from the relevant authority and to comply with the conditions as may be imposed by the relevant authority which are necessary for the issuance of the certificate of fitness under cl 22 of the sale and purchase agreement; **B**
- (c) in respect of the uncompleted units, the respondent is to complete the construction of the units and deliver vacant possession to the house purchasers within the time frame provided in the sale and purchase agreements. The respondent must also proceed to obtain at its own costs and expenses certificates of fitness from the relevant authority in respect of the units; **C**
- (d) in respect of all the units above, the respondent must provide: **D**
- (i) infrastructure such as roads, driveways, drains, culverts, water mains and sewerage plants serving the housing development;
- (ii) services including refuse collection, cleaning of public drains and grass cutting on the road reserves, as from the date of handing over of vacant possession unit the same are taken over by the appropriate authority. **E**

Bungalow land

Pursuant to the terms in the sale and purchase agreements entered into between the land purchasers and the respondent, the respondent's ongoing commitments and obligations are, *inter alia*: **F**

- (1) to deliver vacant possession of the land to the land purchasers; **G**
- (2) to comply with the defects liability requirements for a period of 18 months after the date of handing over of vacant possession to the land purchasers; **G**
- (3) to ensure that the land purchasers comply with the covenants as contained in the sale and purchase agreement which include the completion and construction of dwelling houses on the bungalow land within 18 months from the date of handing over vacant possession; **H**
- (4) to maintain, upkeep and repair the infrastructure;
- (5) to provide services including refuse collection, cleaning of public drains and grass cutting on the road reserves, as from the date of handing over vacant possession until the services are taken over by the appropriate authority. **I**

A Orchard lot

Pursuant to the terms in the sale and purchase agreement entered into between the purchasers and the respondent, the respondent's ongoing commitments and obligations are, inter alia:

- B** (1) to engage the orchard maintenance company (Distinct Acres Sdn Bhd) to provide plant and cultivate on the orchard lands the fruit mix to be chosen by the purchasers;
- (2) to further engage the orchard maintenance company (Distinct Acres Sdn Bhd) to upkeep and maintain the orchard lands for a period of three years from the date of the certificate of planting issued by the said orchard maintenance company;
- C** (3) to deliver vacant possession of the orchard lands within a period of 36 months from the date of signing the sale and purchase agreement;
- (4) to maintain and provide common services such as garbage disposal, sewage disposal, roads maintenance, drains maintenance and water main and electricity cable maintenance for a period of six years from the date of handing over vacant possession or until the appropriate authority takes over the services;
- D** (5) to ensure that the purchasers comply with the various covenants in the sale and purchase agreement.

- E** The location of the Project is adjacent to the proposed Proton City and Institut Tanah dan Ukur Negara. There is evidence to show that under the Eighth Malaysia Plan (2001–2005), a total of 162 projects worth RM839.9m have been proposed by the government for the Batang Padang district, the location where the project is situated. The success of the project is possible to enhance the value of the both the proposed Proton City and Institut Tanah dan Ukur Negara, and to complement the Eighth Malaysia Plan as proposed, which in my humble submission is of national interest. According to the OR's report, only three creditors have filed their claims for a total sum of RM15,843,544.02. The net current assets of the respondent as at 31 May 2000 is RM41,155,724 after taking into account the current liabilities of RM49,083,668. The respondent had maintained a record of net current assets of between RM41m–RM66m for the past three years consecutively as follows:
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Year	Net current assets
1998	RM66,206,753
1999	RM63,463,678
2000	RM41,962,504

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The applicant has also affirmed that during the period of depressed land prices, the applicant is prepared to inject funds into the respondent to hold the lands as stock until land prices have improved. The applicant has applied to the Securities Commission, Malaysia for a rights issue to raise RM51m of which the sum of RM22.4m have been earmarked for the use of the respondent in the project. The Securities Commission, Malaysia has approved the rights issue application of the applicant.

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The law

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An application under s 243 of the Act can be made 'at any time after an order for winding up has been made'. In delivering the decision of the Federal Court, Abdoolcader J (as his Lordship then was) in *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114, citing in approval the decision of Megarry J in *Re Calgary & Edmonton Land Co Ltd (In Liq)* [1975] 1 WLR 355, held that in an application under s 243 of the Act, the court ought to be more ready to grant a stay where the liquidation has been proceeding for only a short while than in cases where the liquidation has been proceeding for a considerable time and much has been done on the faith. The decision of Megarry J in *Re Calgary & Edmonton Land*, was cited with approval by our Federal Court in the case of *Vijayalakshmi Devi d/o Nadchatiram*.

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As has already been observed in the case here, the winding up order was made on 12 June 2000 and after about five months later, the first interim stay of the winding up was granted on 6 November 2000. From the OA's report, it is clear that the liquidation process has yet to commence. In view of the very short period this application is made after the winding up and the fact that liquidation has yet to commence, it is my view that the court ought to be more ready to grant a stay. The principles governing an application under s 243 of the Act are neatly set out by the Federal Court in *Vijayalakshmi Devi d/o Nadchatiram*. In that case, Mohamed Dzaiddin FCJ (YAA Chief Justice as he then was) having considered some of the relevant cases, held at p 718 that:

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In summary, the principles which emerge from the above authorities are these:

- (1) The granting of a stay under s 243 of the Act [Companies Act 1965] is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.
- (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.
- (3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
- (4) Last, and which by no means least, is that stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

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It must, however, be remembered that the above considerations are not meant to be exhaustive ...

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Therefore, one of the principles enunciated in the case of *Vijayalakshmi Devi d/o Nadchatiram* is that it requires the court to consider, amongst others, the interests of the public at large. In the present case, it is my view that it is in the interests of the public at large that the stay should be allowed. The respondent was involved in a very large scale housing development and there is clear evidence to show that several units of houses and lands were sold to the public at large. It is my considered view that if a stay is not allowed, the house and land purchasers of the project would be put in a

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- A** dilemma and in a position of constant uncertainty. Where a stay is not allowed, it is likely to lead to the following consequences:
- (1) The respondent would not be able to fulfil its obligations pursuant to the defective liability period and such obligations may have to be undertaken by the liquidator or contractors employed by the liquidators.
- B**
- (2) The respondent's obligations to obtain the certificate of fitness from the relevant authority and to comply with the conditions which may be imposed have to be undertaken by the liquidator or contractors employed by the liquidators. There will be uncertainty as to when the purchasers would be able to occupy the houses.
- C**
- (3) There will be delay in the construction and completion of the bungalow buildings, bungalow lands and orchard lands with the result that vacant possession cannot be delivered in time to the purchasers with the consequences that:
- D**
- (a) the costs of construction of the bungalow buildings may rise and higher costs are required to complete the buildings;
- (b) the liquidator or contractor employed by him is required to pay liquidated damages to the purchaser due to the delay in delivering vacant possession;
- (c) the construction of the bungalow buildings and the project may have to be abandoned.
- E**
- (4) The collection of the balance purchase price in respect of those completed units of bungalow lands and buildings, bungalow lands and orchard lands will have to be undertaken by the liquidator. The success in collecting the balance purchase price will be adversely affected due to the stoppage of the project.
- F**
- (5) It will be against public interest and public policy if the ordinary purchasers having paid fully or partially the purchase price for the houses and lands were to be deprived of their rights under the sale and purchase agreement against the respondent.
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- (6) Immediate hardship will be caused to the house and land purchasers. They are put in an immediate position of uncertainty as to when the construction of their houses or lands would be completed. In the meantime, the purchasers are expected to service their end-financing commitments.
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- (7) Immediate hardship will be caused to the existing contractors, sub-contractors and suppliers as they are not able to receive any payment which are now lawfully due and payable by the respondent in respect of works done and services rendered.

The position the petitioner

- I** One of the principles laid down in the case of *Vijayalakshmi Devi d/o Nadchatiram* also requires the court to consider the interests the creditors. In my view, a 'creditor' for the purpose of a liquidation must necessarily

mean a creditor who has proved his debts or claims. A close look at the OR's report showed that the petitioner has not even lodged his claims with the official receiver. Further, there is no evidence that the petitioner has been exempted by the court to prove his debts or claims against the respondent. It is for this reason, I find that the petitioner is not a 'creditor' for the purpose of this application. As such, the petitioner is not a proper party to oppose this application or a party whose interest the court should take into consideration.

Even if this court is to find that the petitioner is a 'creditor' for the purpose of this application, I still hold the view that the interests of the public at large in the instant case overrides that of the petitioner's interests, if any. It is clear that the petitioner's only interest, if at all, is towards the payment of the disputed sum of RM2,108,820.22 ('petitioner's disputed claim'). From the evidence adduced by the applicant in the statement of accounts, the respondent was in a financial position to pay the petitioner's disputed claim.

The applicant is a public listed company, its affairs and that of its subsidiaries are subject to the constant scrutiny of the Securities Commission, Malaysia and the Kuala Lumpur Stock Exchange. It was the opinion of the respondent at the material time, and still is of the opinion, that there was a bona fide dispute to the petitioner's disputed claims, in short, for the following reasons:

- (1) that the final account in relation to the main access road work and stage 1 civil infrastructure works have yet to be issued, which is the condition precedent to the respondent's liability to the petitioner in respect of the petitioner's disputed claims;
- (2) that there were defects to be made good by the petitioner in respect of its works performed by the petitioner;
- (3) that the certificates upon which the petitioner is claiming from the respondent is in excess of what it was actually due;
- (4) that there was a delay of 358 days in respect of the stage 1 infrastructure works which amount to RM358,000 of liquidated damages to be paid by the petitioner;
- (5) that it is a term of the contract between the petitioner and the respondent that the final account for the stage 1 civil infrastructure work should be done. Instead of performing the contract to finalize the final account, the petitioner resorted the winding up proceedings;
- (6) that any further dispute after the final account shall be referred to the arbitration for adjudication, but not resorted to winding up proceedings.

There is an appeal to the Court of Appeal against the decision of the learned trial judge.

The position of the official receiver

All the cause papers in this application have been served at the office of the official receiver. The representatives of the official receiver were before the

A court at the hearing of the application. The official receiver did not oppose the interim stay. The official receiver has furnished his report dated 28 November 2000 pursuant to s 243(2) of the Act. It is important to note that the official receiver did not mention in the OR's report that he is objecting to this application. In the applicant's first affidavit, it was affirmed on behalf of the applicant to the effect that:

- B**
- (1) the respondent and its directors have conducted their business according to law and commercial morality since its incorporation;
 - (2) the respondent has been complying with the requirements and provisions of the Act;
- C**
- (3) there is nothing for the liquidator to investigate the conduct of the respondent, its directors and/or its officers.

D A court winding up involves more than a mere realization of the assets and distribution of proceeds by the liquidator. The liquidator, in the case here, the official receiver, is an officer of the court, and as such he has public responsibilities to investigate past activities connected with the company, and in appropriate cases to initiate such further proceedings, civil or criminal, connected therewith as the circumstances may dictate. It is pertinent to note that nowhere in the OR's report is it asserted that the official receiver wishes or intends to proceed to carry out any investigations against the respondent and/or its directors.

E *The contributory*

In the instant case, the applicant is the sole contributory in the respondent company. It is plain that the applicant is supporting the application since it is the applicant's own application for stay.

F *Commercial morality*

G The expression 'detrimental to commercial morality' was considered at some length by the Federal Court in the case of *Vijayalakshmi Devi d/o Nadchatiram* which requires no further elaboration. There is no evidence before this court that there had been misconduct in the affairs of the company which required investigation to the extent that it would be detrimental to commercial morality to have the winding up proceedings stayed.

H *Misfeasance and irregularities*

I It is my finding that there is no evidence of misfeasance or of irregularities which require investigation in the case before this court. There is evidence instead which cannot be disputed that the respondent, its directors and officers have been complying with the requirements and provisions of the Act. In the latest audited accounts of the respondent for the year ending 29 February 2000, the auditors of the respondent in their report to members of the respondent have stated, without any qualification in their opinion that:

- (a) the accounts of the respondent are properly drawn up in accordance with the provisions of the Act and applicable approved accounting standards in Malaysia so as to give a true and fair view of: A
 - (i) the state of affairs of the respondent as at 29 February 2000 and its results and cash flows for the year ending on that date; and
 - (ii) the matters required by s 169 of the Act to be dealt with in the accounts of the respondent; B
- and
- (b) the accounting and other records and the registers required by the Act to be kept by the respondent have been properly kept in accordance with the provisions of the said Act. C

It is my view that if an auditor, in the course of the performance of his duties as auditor of a company, is satisfied that:

- (a) there has been a breach or non-observance of any of the provisions of the Act; and
 - (b) the circumstances are such that in his opinion, the matter has not been or will not be adequately dealt with by comment in his report on the accounts or consolidated accounts or by bringing the matter to the notice of the directors of the company or, if the company is a subsidiary, of the directors of its holding company, the auditor is under a statutory duty pursuant to s 174(8) of the Act to forthwith report the matter in writing to the Registrar of Companies. There is a heavy penalty imposed on the auditor for non-compliance of the said section. Again, I find that there is no evidence of such report being made by the auditor of the respondent to the Registrar of Companies. D
- E

Conclusion

F

Turning back to the principles as illustrated by the Federal Court in the case of *Vijayalakshmi Devi d/o Nadchatiram*, it is my finding that:

- (1) the applicant has shown on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed altogether; G
- (2) the contributory, ie the applicant is supporting the application;
- (3) the official receiver did not indicate that he is opposing the application;
- (4) the grant of a stay will be in the interests of the public at large, namely the house owners and land purchasers in the project, the success of the surrounding projects and the government's Eighth Malaysia Plan; H
- (5) the petitioner is not a proper party before this court. Even if this finding is incorrect, in so far as the interests of the petitioner is concerned, it is limited to the payment of the petitioner's disputed claims since the petition was based on the respondent's alleged inability to pay debts under s 218(1)(e) of the Act. There are strong grounds for appeal against the decision of the learned trial judge; I

- A** (6) the interests of the public at large in any event outweighs or overrides that of the limited interest of the petitioner's disputed claims;
- (7) the grant of the stay would not be detrimental but, on the other hand, conducive to commercial morality and to the interests of the public at large;
- B** (8) there is no evidence of misfeasance or of irregularities demanding investigation.

In the circumstances of the case, I therefore grant an order that all proceedings in relation to the winding up of the respondent be stayed altogether. I also make an order that the costs of this proceeding shall be costs in the cause.

C

Order accordingly.

Reported by Peter Ling

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